Due service and receipt of a copy of the within is hereby admitted

this.....day of October, 1934.

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Proctors for Petitioners.

In the Supreme Court

OF THE

United States

Office Supreme Court,
FILED
JAN 7 193
CHARLES ELMORE CROPLEY

OCTOBER TERM, 1934

Nos. 424 and 425

HILDEGARD SCHOENAMSGRUBER, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent,

and

GUSTAV SCHOENAMSGRUBER,

Petitioner,

vs.

THE HAMBURG AMERICAN LINE (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

BRIEF FOR RESPONDENT
(After Petition for Writ of Certiorari Granted).

J. HAMPTON HOGE,
California Commercial Union Building, San Francisco, California,
S. HASKET DERBY,
Merchants Exchange Building, San Francisco, California,
Proctors for Respondent.

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Merchants Exchange Building, San Francisco, California,
Of Counsel.

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Petitioners filed libels in admiralty for breach of contract to carry passengers on respondent vessel. The trial court, in accordance with section 8 of the United States Arbitration Act, stayed proceedings and referred the cases to an arbitrator as provided for in the contracts sued upon. Petitioners thereupon appealed to the Circuit Court of Appeals.

That court dismissed the appeal as premature, no "final" decree on the merits having been obtained below. Petition for writ of certiorari to the Circuit Court of Appeals was granted.

Thus the issue on appeal is whether an order under the Arbitration Act referring a case to an arbitrator is final and appealable. Other issues in addition are discussed by the petitioners in respect to the enforceability of the arbitration clause in the contract, and while irrelevant on this appeal are nevertheless answered by respondents.

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In the Supreme Court
OF THE
United States

October Term, 1934

Nos. 424 and 425

Hildegard Schoenamsgruber, by Gustav Schoenamsgruber, her guardian,

Petitioner,

vs.

The Hamburg American Line (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent,

and

Gustav Schoenamsgruber,

Petitioner,

vs.

The Hamburg American Line (a corporation), Claimant of the Motorship "The Oakland", her engines, etc.,

Respondent.

BRIEF FOR RESPONDENT
(After Petition for Writ of Certiorari Granted).

STATEMENT OF THE CASE.

All that was done by the court below in this case was to dismiss the appeal as premature on the ground that the order appealed from was not final, but interlocutory and as such not appealable. Therefore, the principal issue on this appeal is whether or not an order made in an admiralty proceeding under section 8 of the United States Arbitration Act is a final order and hence appealable, or merely interlocutory and therefore not appealable.

The orders appealed from were made by the District Court in two admiralty proceedings brought for alleged breach of a maritime contract to carry certain passengers from Germany to this country on board the respondent vessel. The contract relied upon provided for arbitration, and respondents in reliance upon the United States Arbitration Act, particularly section 8 thereof applying to admiralty proceedings, moved the trial court to direct the parties to proceed to arbitration, and in the meanwhile to stay the trial until such arbitration be had as agreed to by the parties to the contract.

The petitioners refused to proceed to arbitrate, and no proceedings before the arbitrator have been had. Instead, the petitioners took an appeal to the Circuit Court of Appeals for the Ninth Circuit. That court refused to entertain the appeal, branding it as "premature" and declaring the orders appealed from to be merely interlocutory and not final.

As the petition for certiorari was directed against the order of the Circuit Court of Appeals, and as that court refused to discuss the merits or the validity of the order

referring the case to the arbitrator, we take it that all that is involved on this appeal is the propriety of the action of the Circuit Court of Appeals and that there is not before this court most of the matters argued by the petitioners, namely, those having to do with the enforcibility of the arbitration clause.

However, we feel compelled to answer the points raised in the briefs and comment on them briefly, although we believe that the petition for certiorari was not granted to consider anything but the action of the court below.

On the procedural point involved we shall argue that the orders referring the cases to the arbitrator on their face show them to be interlocutory and not final, and that the Act under which they were made shows that Congress considered the order directing reference to the arbitrator merely preliminary to the entry of a final decree by the District Court itself.

This court has never passed upon the finality or appealability of such an order as the only case under the Act reaching this court was an appeal from a decree made after arbitration was had, and not from the order directing arbitration. However, we shall refer to many decisions by this court holding decrees not appealable until after there has been a complete disposition of the controversy in the trial court on the merits, and expressly holding non-appealable such analogous orders as those which direct a reference to commissioners, masters, referees, auditors and the like.

I. THE ORDER DIRECTING ARBITRATION WAS NOT A "FINAL" ORDER AND THE CIRCUIT COURT OF APPEALS PROPERLY DISMISSED THE APPEAL THEREFROM AS PREMATURE.

It is settled by statutes and decisions that the Circuit Court of Appeals has no jurisdiction unless the order or judgment appealed from be "final"*.

28 *U. S. Code* §§225, 227, 344;

1 *Corpus Juris,* 1345;

1 *Benedict on Admiralty* (5th ed.) §533;

France etc. Co. v. French Republic, 285 Fed. 290, 292-4;

Oneida Navigation Corp. v. W. & S. Job Co., 252 U. S. 521, 64 L. Ed. 697.

In the case last cited this court said

> "a case may not be brought here in fragments. This court has jurisdiction * * * only from judgments which are both final and complete. * * *
>
> The case was not ripe for appeal. Although the objection was not raised by the appellee, the appeal is dismissed for want of jurisdiction."

Petitioners do not dispute this rule, graphically declaring that

> "to permit litigants to appeal from every adverse ruling would sanction piecemeal litigation, and be productive of a multiplicity of suits. The rule is, therefore, that the cause must be fully disposed of."

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*NOTE: The order appealed from is not affected by the 1926 Act, 28 U. S. Code §227, allowing appeals from certain interlocutory decrees, "determining the rights and liabilities of the parties". That amendment covers only "an interlocutory decree in admiralty determining the rights and liabilities of the parties".
The order here involved is simply one of reference and makes no attempt to decree any rights or liabilities of the parties.

Petitioners then go on to argue that the order appealed from is final.** That is the real question before the court,—namely whether an order rendered by a District Court under §8 of the Arbitration Act is appealable or not. This court has never passed upon the identical question but it has passed upon the appealability of orders involving references to commissioners and the like. The only case*** discussing the "United States Arbitration Act" which has reached this court is

Marine Transit Co. v. Dreyfuss, 284 U. S. 263, 76 L. Ed. 282.

In that case no appeal was taken until after the arbitration was had and a final decree entered. That is the practice we contended should have been followed in the case at bar.

**NOTE: Petitioner's brief (p. 13) intimates that the order referring the case to arbitration was based on German law rather than on the United States Arbitration Act. However, the written notice of motion pursuant to which the order was made expressly states the motion to be based on the "United States Arbitration Act" and does not refer to German law. In fact the orders appealed from themselves (Trans. pp. 88 and 89) expressly recite that the arbitration is to be conducted subject to the "United States Arbitration Act". (For reasons best known to themselves, petitioners have omitted this notice of motion from the printed record.) The *Beechwood* case (35 F. (2d) 41) cited by petitioners was a New York District Court decision that has since been overruled by the Circuit Court of Appeals for the Second Circuit. *Shanferoke v. Westchester S. Corp.*, 70 F. (2d) 297, 298. Furthermore, it involved an arbitration in London, beyond the court's jurisdiction. The order in the case at bar involves arbitration in San Francisco within and under the court's jurisdiction.

***Only three other cases involving the United States Arbitration Act are mentioned in Shepard's Citations as having reached this court. In all three, petitions for certiorari were denied.

Lehigh Structural Steel Co. v. Rust Engineering Co., 287 U. S. 626; 77 L. Ed. 543;

Munson Steamship Line v. North of England Steamship Co., Ltd., 288 U. S. 601; 77 L. Ed. 977;

Petroleum Navigation Co. v. Utility Oil Corp., 292 U. S. 655; 78 L. Ed. 1504.

In the first two cases the award had already been made.

In re North of England S. S. Co., 57 F. (2d) 672;

Lehigh Structural Steel Co. v. Rust Engineering Co., 59 F. (2d) 1038.

The third case involved an order *denying* arbitration.

In re Utility Oil Corporation, 69 F. (2d) 524.

This third case is discussed herein at page 22.

We shall discuss the present case under the following headings:

a. The order appealed from shows on its face that it is not final as the court expressly reserves the right to make further orders and decisions, expressly referring to the subsequent entry of a decree as contemplated by §8 of the Act.

b. The Act itself shows that the order is not the final step in the proceeding, as the entry of a final decree is expressly provided for and power given the District Court to vacate, confirm, modify or correct the award of the arbitrator.

c. As a general rule, no decree is "final" unless it disposes of the rights and liabilities of the parties and disposes of the entire controversy between the parties, leaving no further judicial acts to be performed.

d. In analogous situations, involving orders referring cases to commissioners, referees, etc., this court has held the orders of reference not final.

e. The cases cited by petitioner.

f. The practical consequences involved.

a. THE ORDER APPEALED FROM SHOWS ON ITS FACE THAT IT IS NOT FINAL AS THE COURT EXPRESSLY RESERVES THE RIGHT TO MAKE FURTHER ORDERS AND DECISIONS, EXPRESSLY REFERRING TO THE SUBSEQUENT ENTRY OF A DECREE AS CONTEMPLATED BY §8 OF THE ACT.

The orders appealed from recited (Trans. pp. 85, 88):

"It is hereby ordered and decreed that the entire controversy set out in the libel herein be and the same is hereby submitted to arbitration before E.

Baron von Berchen, German Consul at San Francisco, as arbitrator, and the parties hereto are hereby directed to proceed to arbitrate said controversy before said arbitrator. Said arbitrator may withdraw from the Court for his use in the arbitration proceedings before him, all pleadings, depositions and other papers on file herein, to be returned to this Court with his award herein, unless said pleadings, depositions or other papers are sooner ordered returned by this Court and said pleadings, depositions, and other papers to be at all times subject to the further orders of the Court.

It is further ordered and decreed that until such arbitration has been had and the award of the arbitrator filed herein, the trial of the action herein and further proceedings herein are hereby stayed.

It is further ordered and decreed that this Court retain jurisdiction of the above entitled action to make such orders and enter such decrees as are required or contemplated by 'The United States Arbitration Act' or otherwise permitted or required by law and

It is further ordered and decreed that the arbitration before said arbitrator shall be conducted as required by said act and subject to such rules of law as may be applicable."

It is to be noted that by its terms the order is not final but contemplates a continuing supervision over the proceedings. This "supervision" has been recently commented on by Judge Learned Hand in

Shanferoke v. Westchester S. Corp., 70 F. (2d) 297, 298.

The court expressly orders that it "retains jurisdiction" to make such orders in the premises as are required or permitted by law, expressly mentioning "decrees required or contemplated by "The United States Arbitration Act". The orders expressly contemplate that the proceedings be kept open for the filing of the award and for such action thereon as is required by law. By the terms of the order various pleadings, depositions and other papers are "at all times subject to further orders of the court".

Furthermore, it must be noted that this order was made not in a special proceeding to that end, and terminating with the making of this order, but in the course of an admiralty proceeding filed by the petitioners themselves. Those admiralty proceedings are still pending as the orders appealed from require that until arbitration has been had and the award filed

> "the action herein and further proceedings herein are hereby stayed."

A stay of proceedings is not a termination of the proceedings, but implies they are still pending awaiting further action from the court.

b. THE ACT ITSELF SHOWS THAT THE ORDER IS NOT THE FINAL STEP IN THE PROCEEDING, AS THE ENTRY OF A FINAL DECREE IS EXPRESSLY PROVIDED FOR AND POWER GIVEN THE DISTRICT COURT TO VACATE, CONFIRM, MODIFY OR CORRECT THE AWARD OF THE ARBITRATOR.

Section 3 of the Act (9 U. S. Code §3) states that if a suit or proceeding is pending in any court of the United States the court may stay the trial of the action until any arbitration agreement between the parties is observed.

As considered by Judged Learned Hand in

Shanferoke etc. Co. v. Westchester S. Corp., 70 F. (2d) 297, 299,

a "stay" may involve some supervision over the arbitration and such superintendency is not beyond the powers of the court.

Furthermore, section 8 expressly covers the case at bar as that section refers to admiralty causes of action and provides that if the basis of jurisdiction be an admiralty cause of action the court may direct the parties to proceed with the arbitration,

> "and shall retain jurisdiction to enter its decree upon the award."

This retention of jurisdiction is not for the merely ministerial purpose of entering a formal decree. By §10 of the Act a number of circumstances are set out entitling the court to vacate the award and if within time, to direct a re-hearing of the arbitration. By §11 of the Act the court is given power in described situations to modify and correct the award to effect the intent thereof and promote justice between the parties. Provisions are also set out in §§9, 12 and 13, for motions to the court to confirm, vacate, modify or correct the award.

A reading of the Act thus demonstrates that orders directing arbitration are merely interlocutory orders setting into force various proceedings intended to culminate in a final decree, the Act expressly requiring the court to "retain jurisdiction to enter its decree upon the award".

c. **AS A GENERAL RULE, NO DECREE IS "FINAL" UNLESS IT DISPOSES OF THE RIGHTS AND LIABILITIES OF THE PARTIES AND DISPOSES OF THE ENTIRE CONTROVERSY BETWEEN THE PARTIES, ON THE MERITS, LEAVING NO FURTHER JUDICIAL ACTS TO BE PERFORMED.**

The general rule is stated in

1 *Corpus Juris,* 1346,

as follows:

> "The rule for determining whether, for the purposes of an appeal, a decree is final, is, in brief, whether the decree disposes of the entire controversy between the parties. If it does not dispose of the whole case on its merits, it is not final."

In

Bostwick v. Brinkerhoff (106 U. S.), 16 Otto, 3, 4; 27 L. Ed. 73, 74,

the court says:

> "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. * * * **If the judgment is not one which disposes of the whole case on its merits, it is not final.** Consequently, it has been uniformly held that a judgment of reversal, with leave for further proceedings in the court below, cannot be brought here on writ of error."

The order directing the parties to proceed to arbitration does not determine any rights or liabilities of the parties,

but merely directs that those rights and liabilities be ascertained by arbitration.

A final decision is one which determines "the rights or liabilities of the parties".

Cox v. Graves, 55 F. (2d) 217-218;
Gardner v. Grand Beach Co., 29 F. (2d) 481, 482;
Waialua Agr. Co. v. Christian, 52 F. (2d) 847.

In

Arnold v. United States, 263 U. S. 427, 434; 68 L. Ed. 371, 375, the court said:

"It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction. Hohorst v. Packet Co., 148 U. S. 262, 264, 134 S. Ct. 590, 37 L. Ed. 443; Collins v. Miller, 252 U. S. 364, 370, 40 S. Ct. 347, 64 L. Ed. 616; Oneida Navigation Corporation v. Job, 252 U. S. 521, 522, 40 S. Ct. 357, 64 L. Ed. 697; and cases there cited."

Where an accounting remains to be had, the decree is not final:

Keystone etc. Co. v. Martin, 132 U. S. 91, 93, 33 L. Ed. 275, 276.

Where the decree orders a reference to a master, there is no settlement of the "entire controversy". This court has said that

"Plainly such a decree is not appealable. If it were, the case could be taken to the Appellate Court by successive appeals. But this the law wisely prevents by postponing the right of appeal until there is a final decree disposing of this whole case."

Rexford v. Brunswick etc. Co., 228 U. S. 339, 346, 57 L. Ed. 864, 867.

The rule requires that

"The judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved."

Collins v. Miller, 252 U. S. 364, 370, 64 L. Ed. 616, 619.

An early case declares that

"It has been the object of this court at all times to restrict appeals to those in which the rights of the parties have been fully and finally determined • • • whether they were cases in admiralty, in equity or common law."

Beebe v. Russell (60 U. S.), 19 How. 283, 15 L. Ed. 668.

d. IN ANALOGOUS SITUATION, INVOLVING ORDERS REFERRING CASES TO COMMISSIONERS, REFEREES, ETC., THIS COURT HAS HELD THE ORDERS OF REFERENCE NOT FINAL.

Where a case is referred to a commissioner to take testimony and report, the order of reference

"cannot be regarded as final for the purposes of an appeal."

Deslions v. La Compagnie Generale Transatlantique, 210 U. S. 95, 52 L. Ed. 973.

It is settled that, where a decree fixes the rights of the parties but refers the case to a master or commissioner, the decree is not final. In the case of

California National Bank v. Stateler, 171 U. S. 447; 43 L. Ed. 233, 234,

the court says:

> "The settled rule is that if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon which a further decree is to be entered, the decree is not final." (Citing numerous Supreme Court cases.)

An order referring cases to a master has been held not final and not appealable.

Rexford v. Brunswick etc. Co., 228 U. S. 339, 57 L. Ed. 864, 867;

Latta v. Kilbourn, 150 U. S. 524, 540, 37 L. Ed. 1169, 1175;

Dodge v. Patten, 43 F. (2d) 472, 473 (citing many cases);

Barnard v. Gibson (48 U. S.), 7 How. 650, 12 L. Ed. 857;

Steel & Tube Co. v. Dingess, 3 F. (2d) 805. (Citing many cases.)

The authorities are reviewed by Mr. Justice Brown in

McGourkey v. Toledo & O. C. R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079, 1083,

where the court said:

> "If the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and

no further proceedings in court are contemplated, the decree is final; **but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final.''**

A reference to a master involving judicial functions has been held not to be final.

Beebe v. Russell (60 U. S.), 19 How. 283; 15 L. Ed. 668 (reference to master to take an account of rents);

Humiston v. Stainthorp (69 U. S.), 2 Wall. 106; 17 L. Ed. 905 (reference to take accounts);

Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91; 33 L. Ed. 275 (decree granting injunction and appointing master to take accounts);

Lodge v. Twell, 135 U. S. 232; 34 L. Ed. 153 (decree appointing receiver to sell property.

A decree requiring an accounting has been held not to be final although it grants an injunction on the merits.

Keystone etc. v. Martin, 132 U. S. 93; 33 L. Ed. 275, 276.

An order reversing a lower court and remanding the case for further proceedings has been held not final.

Haseltine v. Central Bank, 183 U. S. 130, 46 L. Ed. 117;

Union Mutual Life Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. Ed. 461.

c. THE CASES CITED BY PETITIONER.

In order to create an apparent conflict between the decision of the Circuit Court of Appeals for the Ninth Circuit

holding that the order directing the parties to proceed to arbitration is not appealable, and other Circuit Courts of Appeals, petitioners state that the following cases are all to the contrary:

In re Utility Oil Co., 69 F. (2d) 524;

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004;

California Prune & Apricot Growers Ass'n v. Catz American Co., 60 F. (2d) 788;

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386;

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779.

Every one of these cases was relied upon by petitioners below, discussed in the briefs and fully considered by the court below. A short comment on these cases will show that they do not support petitioners' contention. We shall discuss first the New York cases, and then the federal cases.

The New York Cases.

In the case of

Hosiery Mfg. Co. v. Goldston, 238 N. Y. 22, 143 N. E. 779,

Judge Pound is careful to point out that the New York Act makes the obtaining of an arbitration order "the end of one special proceeding". Being "the end" of a special proceeding under New York practice, it may well be deemed final, as it is the final order of the separate special proceeding which, as Judge Cardozo points out in the other case, is "not a part of the arbitration".

In the present case the order was not "the end" of any special proceeding, but only one of the steps toward the

obtaining of a final judgment in an admiralty proceeding still pending.

The case of

Marchant v. Mead Mfg. Co., 252 N. Y. 284, 169 N. E. 386,

is not an appeal from an order directing arbitration, but is an appeal from the judgment entered on the award of the arbitrators. That is precisely the remedy open in this case. Petitioners can appeal from the judgment when it is entered on the award of the arbitrators, if at that time they are so advised.

The language attributed Mr. Justice Cardozo in the *Marchant* case omits his citation to the *Goldston* opinion by Judge Pound. Having the omitted citation in mind it is obvious that the court considers that an order directing arbitration terminates a "special proceeding" under the New York Act and therefore is final. But an order made in the course of a pending admiralty proceeding does not end the admiralty case; on the contrary jurisdiction under the act is especially retained for a number of purposes.

The Federal Cases.

The case of

Krauss Bros. v. Bossert & Sons, 62 F. (2d) 1004,

involves an appeal from a decree requiring arbitration. The opinion in the case does not set forth any authorities, but an examination of the record and briefs in the case shows the following facts, which were set forth by us in our brief to the court below and not contradicted by petitioners:

1. Both parties treated the order as final and apparently desired the appeal to be heard. The fact that

the court of its own initiative discussed the point indicates it doubted the appealability of the order.

2. No motion to dismiss the appeal was made.

3. No mention is made in any of the briefs as to whether or not the order was appealable.

4. No authorities on the question of the appealability of the order are referred to in any of the briefs, or even in the court's opinion.

5. That case was a special proceeding under section 4 of the Arbitration Act, whereas our case is an ordinary admiralty libel in which the request for an order for arbitration was made under section 8 of the Arbitration Act.

The decision in

Utility Oil Co., 69 F. (2d) 524,

was from an order *denying* arbitration. The opinion in that case does not discuss the finality or appealability of orders denying arbitration. Moreover, there is an important difference between granting and denying arbitration.

There is a plain analogy to rulings on demurrers. Where a general demurrer is sustained, there is a basis for appeal without a trial. Where the demurrer is overruled, the case must be tried before the ruling on the demurrer can be appealed. This distinction is suggested by the court in

The Maria, 67 F. (2d) 571,

holding non-appealable an interlocutory decree in admiralty overruling exceptions and denying a motion to dismiss the libel. The court says:

"It is clear that here not all of the 'merits' have yet been decided, by which we mean those issues on

which liability, as distinguished from its amount, may depend finally.

Whenever a demurrer is overruled, a successful appeal will terminate the suit, unless the pleading be amended.

The reason for denying the appeal, when the case is in that posture, is that, if the decision prove to be right, a second appeal may be necessary."

* * * * * * *

" 'The rights and liabilities of the parties' are therefore fixed only on the hypothesis that the ruling was wrong, and that cannot be ascertained while the appeal is pending. Thus the question must be begged on which the existence of our jurisdiction turns."

The *Catz American* case was a decision in the Ninth Circuit by the same court whose order is appealed from here. In its opinion below herein the court points out that in its earlier decision there was involved an appeal from an order directing arbitration under the state act. The court points out that the state law provides for a special and summary proceeding to procure an order for arbitration and that an order under such a statute has been held to be final by the Court of Appeals of the State of New York in two New York cases, which are the ones above mentioned. The court below then distinguishes the two New York cases by pointing out that the order for arbitration here was "made in the course of litigation inaugurated by the libellant under the general law", and was not a special proceeding to procure an order for arbitration.

F. THE PRACTICAL CONSEQUENCES INVOLVED.

The same logic which would permit an appeal from the interlocutory order in this case, would permit an appeal from every other step in the case. When a demurrer is overruled, counsel could with the same logic argue that an appeal might make unnecessary a trial of the facts; so likewise when a case is referred to a special master, or a commissioner in admiralty, or when exceptions are overruled to a libel. As stated in petitioner's brief:

> "To permit litigant to appeal at every step in the litigation from every adverse ruling would sanction piecemeal litigation and be productive of a multiplicity of suits. The rule is therefore that the cause must be fully disposed of."

This case will not be "fully disposed of" until the trial court enters a judgment upon the arbitration award as contemplated by section 8 of the United States Arbitration Act.

As a practical matter, after a hearing on the merits, perhaps no appeal at all will be necessary. If at that time an appeal is necessary every point can then be raised as is raised now.

Chief Justice Marshall has declared that thus to permit an appeal at an intermediate stage would make possible repeated appeals to the "great oppression" of the parties and that such an attempt to obtain the premature decision of this court is repugnant to the spirit and letter of our judicial system and that this court cannot exercise its ordinary appellate jurisdiction until a final judgment or decree is entered in the inferior court.

Life etc. Co. v. Adams (34 U. S.), 9 Pet. 573, 602, 604, 9 L. Ed. 234, 244, 245.

This court has alluded to the expense of repeated appeals as being behind the policy of forbidding appeals except from final orders. In the case of

McLish v. Roff, 141 U. S. 661, 666; 35 L. Ed. 893, 894,

it is declared:

> "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error (with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887), have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

The court refers to the Act of 1891 establishing Circuit Courts of Appeals and points out that the public policy therein set forth to relieve this court of its "enormous overburden" would be defeated if repeated appeals in the same case were permitted.

II. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE.

Petitioners' argument as to the invalidity of the arbitration clause is not relevant on this appeal, and on its merits is plainly answered by the express terms of the United States Arbitration Act.

Before the passage of the United States Arbitration Act in 1926, many courts refused to enforce arbitration agreements upon the alleged public policy that courts should not be ousted of their jurisdiction by the mere agreement of the parties.

Typical of such obsolete cases are those now cited by petitioners (without calling attention to the fact that policy purported to be expressed in those cases has since been reversed by Congress and the courts and condemned as "an anachronism").

These are:

Guaranty etc. Co. v. Green etc. Co., 139 U. S. 137, 35 L. Ed. 116;

Potomac etc. Co. v. Baker Salvage Co., 123 U. S. 40, 31 L. Ed. 75;

Blodgett v. Bebe Co., 190 Cal. 665; 214 Pac. 38.

The first case was decided in 1890 (and has no reference to arbitration at all). The second was decided in 1887. The California case was decided in 1923 and in 1927 the California legislature passed a statute overturning the rule therein laid down and enacted a statute similar to the Arbitration Act enacted by Congress the previous year.

California Statutes 1927, p. 404, adding §§1280-1293 to California Code of Civil Procedure.

Decisions denying force to arbitration clauses as allegedly "ousting the jurisdiction of the courts" provoked quite a public outcry. Business organizations protested so vigorously that Congress made a special investigation resulting in the United States Arbitration Act of 1926, which repudiates the alleged public policy set out in these old cases cited by appellants.

This is discussed by the court in

The Silverbrook, 18 F. (2d) 144, 146,

which quoted that part of the Congressional report declaring

"The need for the law arises from an anachronism of our American law."

This report is also referred to by this court in the *Marine Transit* case, cited below.

As recently stated by Mr. Justice Martin in

In re Utility Oil Corp., 69 F. (2d) 524, 526:

"The United States Arbitration Act • • • was intended • • • to change this view • • • It is quite apparent that Congress intended • • • to validate arbitration agreements as affirmative defenses in admiralty."

Even before the passage of the Arbitration Act, the United States Supreme Court stated in

Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 121, 122; 68 L. Ed. 582, 585:

"In admiralty also, agreements to submit controversies to arbitration are valid. Reference of maritime controversies to arbitration has long been common practice."

In that case was upheld the validity of the Arbitration Law of New York.

The validity of arbitration clauses (entered into since February 12, 1925) has been upheld under the Act by the United States Supreme Court in

Marine Transit Co. v. Dreyfuss, 284 U. S. 263, 76 L. Ed. 282.

This is in accord with the public policy set out in the Act of 1925 (9 U. S. Code, §2), which provides that

"A written provision in any maritime transaction or contract • • • to settle by arbitration a controversy • • • shall be valid, irrevocable and enforceable."

Counsel also refers to

5 *Corpus Juris*, 20,

as supporting the rule that "parties will not be permitted, by agreement, to submit to arbitration, to oust the jurisdiction of the courts". By adding a comma after the word agreement, petitioners have completely changed the meaning of the text writer. Of course, "by agreement to submit to arbitration" the parties can not oust the review allowed by law over the acts of the arbitrators, and the arbitration clause here must be construed to assume that in agreeing to arbitration they are subject to the laws governing arbitration. But to say that parties can not arbitrate because to do so would "oust the jurisdiction of the courts" is to open up a controversy which has been settled by Congress and the courts. Both now uphold and declare enforceable agreements to arbitrate.

The *Corpus Juris* article on arbitration was published in 1916. It was not until 1920, in New York, that the first statute was enacted expressly embracing agreements to arbitrate future disputes.

Sturges, Commercial Arbitration and Awards (1930), p. 88.

The validity of the New York statute was upheld by this court in the *Red Cross Line* case just cited.

The Thurston case did not involve any judicial controversy.

The libelants misinterpret the decision in *In re Thurston* (C. C. A. 2nd, 1931), 48 F. (2d) 578. The all-controlling circumstance in that case was that there was *no judicial controversy and no agreement to arbitrate.* A marine insurance policy covering a barge provided that in case of loss, a survey of the loss should be made. Each party was

to appoint one surveyor and, if they failed to agree, "an umpire was to be appointed pursuant to the United States Arbitration Act, section 5". (9 U. S. C. A., section 5.) On application, the District Court appointed an umpire. The umpire submitted a report, containing specifications of the work required to be done and the manner in which it should be done, in order to repair the damage caused by the disaster. On further application, the District Court confirmed the report, after making a certain modification. The appeal was by the owner of the barge who was dissatisfied with the modification.

The court was at pains to point out (page 579, bottom of column 2):

> "By the stipulation of the parties, he" (the umpire) "was to make no award fixing the amount of damages. His report was solely for the purpose of determining how the repairs should be carried out, and HAD NOTHING TO DO WITH THE AMOUNT OF THE ULTIMATE LIABILITY."

The court further stated (see beginning of last paragraph of column 2 on page 579) that the parties merely agreed to adopt the *procedure* for the appointment of an umpire in the manner provided for in section 5 of the United States Arbitration Act, and the court added, at the conclusion of the paragraph we have referred to, that "other provisions of the United States Arbitration Act were not made applicable by the parties."

The Circuit Court of Appeals held that the District Court erred in confirming the report, because there was no judicial controversy. In other words, the parties simply provided for the appointment of an umpire, in a

manner which happened to be in accord with the procedure set forth in section 5 of the United States Arbitration Act, who was to render a preliminary survey, but was to do nothing else. The upper court stated that "no judgment could be rendered on this report" (page 580, top of column 1), and that under the United States Arbitration Act, a decree is to be rendered upon the award only "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty", and the controversy must be such that "the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings". In the *Thurston* case, none of these things was true. There was simply, as we have said, a procedure for a survey upon which no admiralty proceeding could be initiated.

The distinction with the case at bar is manifest. Here, there is a judicial controversy. The plaintiff has brought suit for a money recovery under a contract containing a definite and positive arbitration clause. In the *Thurston* case, the court very properly held that the parties

> "did not stipulate for arbitration under this act • • • here the parties did not bring their dispute within either section 8 or section 9 of the act."

In our case section 8 is expressly applicable. For there is before the District Court a pending libel in admiralty, and in the admiralty proceeding, a motion for arbitration was made. There is, therefore, applicable the plain terms of section 8 declaring that

> "if the basis of jurisdiction be a cause of action otherwise justiciable in admiralty • • • the court shall then

have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

III. NO QUESTION OF PUBLIC POLICY IS INVOLVED IN THIS CASE.

Petitioners' argument on this phase of the case is somewhat confusing, but must be considered in two aspects. First it is suggested that arbitration per se is against public policy. It is not necessary to argue this point, as Congress has, after careful consideration, determined the public policy of the nation in this respect and has decided that public policy should favor arbitration. This is discussed under a previous heading.

Next it is suggested that arbitration is a device whereby a shipowner may escape liability for its negligence and in this connection cases are cited such as *The Kensington* (183 U. S. 263), and the *Corcoran* case (9 F. (2d) 13), to the effect that the court should not enforce such clauses. However, no such clauses are here involved. Counsel did not point to any such clauses in which the respondent seeks to exempt itself from liability for negligence. This makes pointless all the citations by petitioners on this phase of the case.

The argument that to permit arbitration is to permit a shipowner to free itself from liability assumes that the arbitrator will decide against the petitioners. However, if the arbitrator should attempt to put into effect anything contrary to the public policy of the United States or its paramount applicable laws, the court, by the express terms of the United States Arbitration Act retains jurisdiction.

There can be no presumption that the arbitrator will attempt to do anything contrary to public policy, but should he attempt to do so, the court can exercise its jurisdiction and refuse to enter any decree inconsistent with the laws of the United States or its public policy.

It is suggested that the trial court considered German law in granting arbitration. This is not true. Also an overruled case is cited to the effect that arbitration beyond the jurisdiction of this court is involved. This is not true either. Both these matters we discussed in the footnote on page 5 hereof.

Finally, it is suggested that the arbitrator might improperly apply German law. There is no presumption that the arbitrator will apply German law or that, if he does, he will do so contrary to American requirement. Where not contrary to American public policy, clauses involving the application of foreign law have often been upheld by the admiralty courts.

For example see:

London Assurance Co. v. Companhia De Moagens, 167 U. S. 149, 161; 42 L. Ed. 113, 121;

Olympia Canning Co. v. Union Marine Ins. Co., 10 F. (2d) 72;

Aetna Ins. Co. v. Sacramento-Stockton S. S. Co., 273 Fed. 55;

The Constantinople, 15 F. (2d) 97;

Boole v. Union Marine Insurance Co., 52 Cal. App. 207, 209; 198 Pac. 416;

Liberty etc. Co. v. New England etc. Inc., 25 F. (2d) 493, 495;

United etc. Co. v. Luketa, 58 F. (2d) 944, 945.

In the case at bar all the parties are German citizens, the contract was executed in Germany to be performed on a German vessel, and the alleged cause of action arose on the high seas on a German vessel and involves only German subjects.

However, the question of what law governs is of no materiality at this time, for all that is involved is the propriety of the arbitration. We are relying on the express terms of the United States Arbitration Act and not on any German law.

a. The agreement to arbitrate is in legible type and is binding upon petitioners, whether read by them or not.

Petitioners make the unfair suggestion that the arbitration provision in the passenger ticket could not be read with ordinary eyesight and refer to the photostatic copy of the ticket in the transcript. This photostatic copy is of reduced size and, even in reduced form, is legible.* The same point was made by petitioners in the trial court and the trial judge read the ticket and decided that it was legible. As a matter of fact the original passenger ticket itself, i. e., the duplicate copy retained by respondent, was produced by respondent on depositions taken in Germany and is now in the records of the District Court in San Francisco. By failing to produce the original on file with the court, petitioners are certainly estopped from arguing as to the legibility of its provisions and their reference to a photostatic copy reduced in size certainly calls for a rebuke.

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*The type used in the passenger ticket is approximately agate, and is about the same size as that used on the upper division of each page of Webster's Standard Dictionary, and is larger than that used in the dictionary on the lower division of each page.

Petitioners further claim that the arbitration provision in the ticket was not called to their attention. This is not necessary, as failure to read the provisions does not relieve the passenger from them.

A decision by Judge Cardozo in the New York Court of Appeals discusses this matter.

Murray v. Cunard S. S. Co., 235 N. Y. 162; 139 N. E. 226, 228.

Accord:

Leviathan (Sherbo v. United States), 72 F. (2d) 286, 287-8; 1934 A. M. C. 1106, 1109.

Further suggestion is made that the provisions of the ticket are not binding because of the fact that the allegedly injured female is a minor. In view of the fact that she is suing on a contract she is bound by its provisions. This is discussed under the next heading.

IV. THE ARBITRATION PROVISION IS BINDING ON THE MINOR. HER CLAIM IS BASED ON THE CONTRACT AND SHE MUST TAKE THE CONTRACT AS SHE FINDS IT.

On this phase of the case it is essential to note that each libel is expressly designated as a "libel in rem • • • for breach of contract". (Tr. pp. 3 and 11.)

Each libel alleges in identical language as follows:

"IV.

On or about the 30th day of October, 1929 • • • the said libelant and his wife agreed with the said Hamburg American Line, that for a valuable consideration, they undertook to safely carry their minor child, Hildegard Schoenamsgruber, of the age of six years

across the ocean from Hamburg, Germany, to the City and County of San Francisco * * *."

"VI.

Said libelees and each of them thereupon broke and violated said contract to safely carry said minor child Hilda Schoenamsgruber from the said City of Hamburg to the said City and County of San Francisco in the following particulars, to-wit."

As the entire cause of action is based on alleged breach of the contract, the petitioners are bound by the provisions of the contract on which they rely.

However, suit cannot be brought on the contract, accepting it in part and repudiating it in part. The arbitration clause is part of the contract and if libelants seek to rely on the contract, they must accept it as a whole. The courts have held that provisions in passenger tickets are binding upon guardians bringing suit to seek damages for injuries to a minor.

The case of

The Finland, 35 F. (2d) 47,

involves a similar situation to the one at bar. There, the mother bought a ticket for the transportation of herself and her minor child. The father, as here, sued as guardian ad litem for injuries received by the child. The ticket contained a clause barring claims not filed within 30 days. The court held the time limitation valid and binding although the child was a minor.

The court quotes from

O'Laughlin v. Union Central Life Ins. Co., 11 Fed. 280:

"It is said that because the beneficiaries here are minors, that therefore the condition cannot be enforced. I have been unable to find any authority in support of that proposition, and it seems the counsel has not instanced any. *A guardian can bring the suit and is bound to bring it under the contract and according to the contract.* It is not a suit that cannot be brought. It is not a suit that the parties, by reason of their disability, cannot bring; but *it is a suit which the guardian can bring, and is bound to bring, I think, in accordance with the terms of the contract.*"

The court also cites the case of

Rady v. Netherlands etc. Co., 1929 A. M. C. 95; affirmed 28 F. (2d) 1017,

where the court likewise held a guardian ad litem bound by a passenger contract provision requiring suit to be brought within ninety days.

Recently the Circuit Court of Appeals for the Second Circuit has held a minor bound by a clause limiting the vessel's liability where that clause appeared in the passenger ticket under which she had been transported.

The Leviathan (Sherbo v. United States), 72 F. (2d) 286, 288; 1934 A. M. C. 1106, 1109.

The court there says:

"It is also claimed that the limitation of value in the ticket was not binding upon the plaintiff because she was a minor when she bought the ticket and used it. Her right to have her trunk loaded on the ship,

however, and carried to New York by the defendant was a contract right which she acquired by purchasing the ticket. Likewise as to her right to declare and pay for excess value with the correlative right to recover her actual damages up to the amount of her declaration if the defendant failed to perform and her property was injured by such failure.

The basis of her action is her status, by virtue of her ticket, as a passenger on the defendant's ship whose baggage was negligently injured by the defendant who undertook to carry it as a part of its obligations under her ticket. Its failure to handle it with due care was a breach of an implied condition of its undertaking.

She cannot sue to enforce her rights under the contract without being herself bound by its terms. Compare, Finland, 1929 A. M. C. 1396, 35 F. (2d) 47, 49; Pacific S. S. Co. v. Sutton, 1925 A. M. C. 1335, 7 F. (2d) 579. Decree affirmed."

None of the cases cited by petitioners under this heading involve attempts to repudiate on behalf of minors conditions of the contract upon which the minor is relying.

CONCLUSION.

It has been the policy of this court from the very beginning to oppose repeated appeals in cases and to require every matter in controversy to be settled in a single appeal. Every right that petitioners seek can be had upon appeal from the final decree required by the Arbitration Act. To permit an appeal now would involve a second hearing by this court in the event either party is dis-

satisfied with the final decree. The action of the court below in refusing to consider the premature appeal should be affirmed.

Dated, San Francisco, California,
January 2, 1935.

Respectfully submitted,
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